No. 17-988

IN THE

Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

MICHELE M. VERCOSKI
Counsel of Record
RICHARD D. MCCUNE
MCCUNE WRIGHT AREVALO, LLP
3281 East Guasti Road
Suite 100
Ontario, CA 91761
(909) 557-1250
mmv@mccunewright.com

SCOTT L. NELSON
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Respondent

August 2018

QUESTIONS PRESENTED

1. Did the court of appeals have appellate jurisdiction over the petitioners' appeal of the district court's order granting petitioners' motion to compel arbitration, directing arbitration to proceed, and dismissing respondent's claims without prejudice?

2. Does the Federal Arbitration Act (FAA) preempt the conventional state contract-law principles applied by the court of appeals in construing the distinctive language of the arbitration agreement at issue to authorize class arbitration?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES v
INTRODUCTION 1
JURISDICTION 1
STATUTES INVOLVED 2
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 6
ARGUMENT 9
I. This Court lacks jurisdiction because the district court's orders were not appealable. 9
A. The FAA precludes appeals of orders compelling arbitration. 9
B. Lamps Plus lacks standing to appeal the district court's dismissal order, which it sought and does not challenge. 12
II. The FAA does not preempt application of state contract-law principles to determine whether an agreement permits class proceedings. 17
A. The FAA is premised on state contract law. .. 17
B. This Court's decisions recognize that state contract law governs the determination whether an arbitration agreement authorizes class proceedings. 19
III. The California contract-law principles applied by the lower courts in this case are consistent with the FAA. 25

A. Interpretive principles of California contract law seek to ascertain the parties' objectively manifested intent. 26

B. The FAA does not preempt California's principles of contract interpretation. 28

IV. Lamps Plus's claim that the courts below misinterpreted the agreement does not establish a violation of the FAA. 35

A. The correctness of the courts' contract interpretation is a state-law question. 35

B. The lower courts correctly applied neutral California contract law 37

V. Both Lamps Plus's policy arguments and its waived request that the Court require a heightened standard of clarity for agreements to class arbitration are unavailing. 48

A. Lamps Plus did not preserve an argument for a "clear and unmistakable" standard. 48

B. Lamps Plus's policy arguments for a stricter standard are unconvincing. 49

C. Lamps Plus's new theory that class arbitration is a matter of "arbitrability" does not support its position. 52

CONCLUSION 54

APPENDIX – Statutes Involved

1. 9 U.S.C. § 16 ..... 1a
2. 28 U.S.C. § 1254 ..... 2a
3. 28 U.S.C. § 1291 ..... 2a

4. Cal. Civ. Code § 1635 ..... 2a
5. Cal. Civ. Code § 1636 ..... 2a
6. Cal. Civ. Code § 1638 ..... 2a
7. Cal. Civ. Code § 1644 ..... 2a
8. Cal. Civ. Code § 1649 ..... 3a
9. Cal. Civ. Code § 1654 ..... 3a

TABLE OF AUTHORITIES

Cases **Page(s)**

AIU Ins. Co. v. Super. Ct.,
799 P.2d 1253 (Cal. 1990) 27, 28, 38

Al Rushaid v. Nat'l Oilwell Varco, Inc.,
814 F.3d 300 (5th Cir. 2016) 11

Arthur Andersen LLP v. Carlisle,
556 U.S. 624 (2009) 18

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 22, 23, 25, 32, 34, 35, 54

AT&T Techs., Inc. v. Comm'c'ns Workers of Am.,
475 U.S. 643 (1986) 37

Augustea Impb Et Salvataggi v. Mitsubishi Corp.,
126 F.3d 95 (2d Cir. 1997) 10, 11

Bank of the West v. Super. Ct.,
833 P.2d 545 (Cal. 1992) 26, 27, 28, 29

Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co.,
671 F.3d 635 (7th Cir. 2011) 11, 12

Brant v. Calif. Dairies, Inc.,
48 P.2d 13 (Cal. 1935) 26, 27

Bushley v. Credit Suisse First Boston,
360 F.3d 1149 (9th Cir. 2004) 11

California v. Rooney,
483 U.S. 307 (1987) 14

Camreta v. Greene,
563 U.S. 692 (2011) 15

Caterpillar Inc. v. Lewis,
519 U.S. 61 (1996) 53

Catlin v. United States,
324 U.S. 229 (1945) 13

Concerned Citizens of Cohoctin Valley, Inc. v. N.Y. State Dep't of Env'tl Conservation,
127 F.3d 201 (2d Cir. 1997) 14

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 13

Dart Cherokee Basin Operating Co. v. Owens,
135 S. Ct. 547 (2014) .....

Decter v. Stevenson Props., Inc.,
247 P.2d 11 (Cal. 1952) 27

Devlin v. Scardelletti,
536 U.S. 1 (2002) 46

Digital Equip. Corp. v. Desktop Direct, Inc.,
511 U.S. 863 (1994) 13

DIRECTV, Inc. v. Imburgia,
136 S. Ct. 463 (2015) 17, 34, 35, 36, 37

Dish Network L.L.C. v. Ray,
__ F.3d __, 2018 WL 3978537
(10th Cir. Aug. 21, 2018) 43, 54

Empire Healthchoice Assur., Inc. v. McVeigh,
547 U.S. 677 (2006) 18

Epic Sys. Corp. v. Lewis,
138 S. Ct. 1612 (2018) 31, 54

Erie R.R. v. Tompkins,
304 U.S. 64 (1938) 17

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 18

Firestone Tire & Rubber Co. v. Risjord,
449 U.S. 368 (1981) 9

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 5, 17, 53, 54

Frisby v. Schultz,
487 U.S. 474 (1988) 37

Grayson v. K Mart Corp.,
79 F.3d 1086 (11th Cir.), *cert. denied*,
519 U.S. 982, 519 U.S. 987 (1996) 14

Green Tree Fin. Corp. v. Bazzle,
539 U.S. 444 (2003) 51

Green Tree Fin. Corp.-Ala. v. Randolph,
531 U.S. 79 (2000) 13, 16

Hohn v. United States,
524 U.S. 236 (1998) 9

Howsam v. Dean Witter Reynolds, Inc.,
537 U.S. 79 (2002) 52, 53

H.R. Techs., Inc. v. Astechnologies, Inc.,
275 F.3d 1378 (Fed. Cir. 2002) 14

Huddleston v. Dwyer,
322 U.S. 232 (1944) 36

Interactive Flight Techs., Inc. v. Swissair Swiss Air Transport Co.,
249 F.3d 1177 (9th Cir. 2001) 14

Katz v. Cellco P'ship,
794 F.3d 341 (2d Cir.), *cert. denied*,
136 S. Ct. 596 (2015) 16

Keena v. Groupon, Inc.,
886 F.3d 360 (4th Cir. 2018) 15

Kindred Nursing Ctrs. Ltd. P'ship v. Clark,
137 S. Ct. 1421 (2017) ..... *passim*

Kinecta Alternative Fin. Solutions, Inc. v. Super. Ct.,
140 Cal. Rptr. 3d 347 (Cal. Ct. App. 2012),
disapproved, Sandquist v. Lebo Auto., Inc.,
376 P.3d 506 (Cal. 2016) 46

Lewis v. Epic Sys. Corp.,
823 F.3d 1147 (7th Cir. 2016),
rev'd, 138 S. Ct. 1612 (2018) 4

M & G Polymers USA, LLC v. Tackett,
135 S. Ct. 926 (2015) 21

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 33, 34, 36, 40

Mathias v. Worldcom Techs., Inc.,
535 U.S. 682 (2002) 14

Microsoft Corp. v. Baker,
137 S. Ct. 1702 (2017) 14, 15

Mitsubishi Motors Corp. v. Soler
Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 21, 26, 53

Morris v. Ernst & Young, LLP,
834 F.3d 975 (9th Cir. 2016),
rev'd sub nom. Epic Sys. Corp. v. Lewis,
138 S. Ct. 1612 (2018) 4

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 9, 12

Murdock v. City of Memphis,
87 U.S. 590 (1875) 36

Nelsen v. Legacy Partners Residential, Inc.,
144 Cal. Rptr. 3d 198 (Cal. Ct. App. 2012) 46, 47

Nixon v. Fitzgerald,
457 U.S. 731 (1982) 9

Oxford Health Plans LLC v. Sutter,
569 U.S. 564 (2013) ..... *passim*

Parr v. United States,
351 U.S. 513 (1956) 14

Patel v. Liebermensch,
197 P.3d 177 (Cal. 2008) 26

People v. Shelton,
125 P.3d 290 (Cal. 2006) 26

Perry v. Thomas,
482 U.S. 483 (1987) 20, 21

Preferred Care of Del., Inc. v. Estate of Hopkins,
845 F.3d 765 (6th Cir. 2017) 10

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 18

Powerine Oil Co. v. Super. Ct.,
118 P.3d 589 (Cal. 2005) 5

Raytheon Co. v. Automated Bus. Sys., Inc.,
882 F.2d 6 (1st Cir. 1989) 40

Reigelsperger v. Siller,
150 P.3d 764 (Cal. 2007) 26, 27

Rent-A-Center, West, Inc. v. Jackson,
561 U.S. 63 (2010) 42, 43, 53

Richards v. United States,
369 U.S. 1 (1962) 37

Rodriguez v. 32d Leg. of V.I.,
859 F.3d 199 (3d Cir. 2017) 14

Sandquist v. Lebo Auto., Inc.,
376 P.3d 506 (Cal. 2016) 6, 28, 31, 32, 46, 47, 48

Sea-Land Serv., Inc. v. Dep't of Transp.,
137 F.3d 640 (D.C. Cir. 1998) 14

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,
559 U.S. 393 (2010) 44

Spirit Airlines, Inc. v. Maizes,
__ F.3d __, 2018 WL 3866335
(11th Cir. Aug. 15, 2018) 43

Stedor Enters., Ltd. v. Armtex, Inc.,
947 F.2d 727 (4th Cir. 1991) 9

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010) ..... *passim*

Swatch Group Mgmt. Servs. v. Bloomberg L.P.,
756 F.3d 73 (2d Cir. 2014) 14

Textile Workers Union v. Lincoln Mills of Ala.,
353 U.S. 448 (1957) 18

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 49

United States v. Nixon,
418 U.S. 683 (1974) 9

Vaillette v. Fireman's Fund Ins. Co.,
22 Cal. Rptr. 2d 807 (Cal. Ct. App. 1993) 27

Victoria v. Super. Ct.,
710 P.2d 833 (Cal. 1985) 28

Virginia v. Am. Booksellers Ass'n,
484 U.S. 383 (1988) 37

Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.,
489 U.S. 468 (1989) ..... *passim*

Wells Fargo Advisors, LLC v. Sappington,
884 F.3d 392 (2d Cir. 2018) 43

Winet v. Price,
6 Cal. Rptr. 2d 554 (Cal. Ct. App. 1992) 27

Will v. Hallock,
546 U.S. 345 (2006) 9

Wood v. Allen,
558 U.S. 290 (2010) 49

Yamaha Motor Corp., U.S.A. v. Calhoun,
516 U.S. 199 (1996) 22

Yee v. City of Escondido,
503 U.S. 519 (1992) 49

Zepeda v. INS,
753 F.2d 719 (9th Cir. 1983) 40

Statutes and Rules

9 U.S.C. § 2 ..... 17, 53

9 U.S.C. § 3 16

9 U.S.C. § 4 ..... 6, 10, 11, 53

9 U.S.C. § 16 2

9 U.S.C. § 16(a)(1)(B) 9, 11

9 U.S.C. § 16(a)(3) 6, 12, 13

9 U.S.C. § 16(b)(2) 6, 9, 10, 11

28 U.S.C. § 1254 ..... 2, 9

28 U.S.C. § 1291 ..... 2, 13

Cal. Civ. Code div. 3, pt. 2, t. 3 31

Cal. Civ. Code § 1635 ..... 2, 31

Cal. Civ. Code § 1636 ..... 2, 26
Cal. Civ. Code § 1638 ..... 2, 27
Cal. Civ. Code § 1644 ..... 2, 27
Cal. Civ. Code § 1649 ..... 2, 28
Cal. Civ. Code § 1654 ..... 2, 28
Fed. R. Civ. P. 23 44

Other

11 Williston on Contracts (4th ed.) 21, 30

AAA Supplementary Rules for Class Arbitrations, https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf 41, 42

JAMS Class Action Procedures, https://www.jamsadr.com/rules-class-action-procedures/ 41, 42

Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 Indus. & Lab. Rel. Rev. 1019 (2015) 52

Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lab. L. 71 (2014) 52

Alexander J.S. Colvin, *An Empirical Study of Arbitration: Case Outcomes and Processes*, 8 J. Empir. Legal Stud. 1 (2011). 52

INTRODUCTION

The lower courts in this case engaged in a quintessential exercise in state-law contract construction when they interpreted an ambiguous arbitration agreement to allow arbitration on a classwide basis. In seeking to overturn that determination, petitioner Lamps Plus asks this Court to rule on a question that is not properly before any appellate court because the district court's order directing arbitration was not appealable. Moreover, Lamps Plus lacks standing to appeal the dismissal of respondent Frank Varela's claims without prejudice because Lamps Plus asked for the dismissal and does not seek to set it aside.

If this Court nonetheless addresses the merits, it should hold that the Federal Arbitration Act (FAA) does not preempt the lower courts' application of California contract law to the parties' agreement. This Court has held that the FAA requires determinations about class arbitration to rest on a "contractual basis." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). Far from displacing state contract law, *Stolt-Nielsen* makes state law dispositive. The lower courts applied established principles of California contract law, including the rule that ambiguous contracts are construed against the drafter, to determine whether the parties *agreed* to class arbitration. Those principles do not disfavor arbitration, and the FAA does not preempt them. The lower courts' decision that the agreement to arbitrate was not limited to individual claims thus fully comports with the FAA.

JURISDICTION

Lamps Plus correctly describes the facts establishing the timeliness of its invocation of this Court's

jurisdiction. The Court's jurisdiction, however, also depends on whether the case was properly "in the court of appeals." 28 U.S.C. § 1254. Here, Lamps Plus appealed an order of the district court *granting* its motions to compel arbitration and to dismiss Mr. Varela's claims without prejudice. Pet. App. 23a. As explained below, that order is not appealable insofar as it compelled arbitration, and Lamps Plus lacks standing to appeal a dismissal that it asked for and does not seek to overturn. Because the appeal was not properly in the court of appeals, this Court lacks jurisdiction under section 1254.

STATUTES INVOLVED

In addition to the provisions set forth in the brief of Lamps Plus, this case involves the FAA's appellate-review provision, 9 U.S.C. § 16; the statutes defining the jurisdiction of this Court and the court of appeals, 28 U.S.C. §§ 1254 and 1291; and the contract interpretation principles of California Civil Code §§ 1635, 1636, 1638, 1644, 1649, and 1654. These statutes are reproduced in pertinent part in the appendix to this brief.

STATEMENT OF THE CASE

Respondent Frank Varela has been an employee of petitioner Lamps Plus, Inc., since 2007. In March 2016, Lamps Plus allowed a criminal to gain access to copies of W-2 income and tax withholding statements of approximately 1,300 of its employees, including Mr. Varela. As a result, a fraudulent 2015 federal income tax return was filed in Mr. Varela's name.

Mr. Varela filed suit in the United States District Court for the Central District of California against Lamps Plus, Inc., and two related corporations (collectively, "Lamps Plus") asserting federal and state-law

claims on behalf of a class of current and former employees of Lamps Plus and others injured by the exposure of personally identifying information. Lamps Plus moved to compel arbitration under a provision in Mr. Varela's employment agreement requiring arbitration of "all claims that may ... arise in connection with [his] employment." Pet. App. 25a. Simultaneously, Lamps Plus moved to dismiss Mr. Varela's claims.

The arbitration provision states (among other things) that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment," *id.* at 24a, that all claims "that, in the absence of this Agreement, would have been available to the parties by law" are arbitrable, *id.* at 26a, and that the arbitrator "is authorized to award any remedy allowed by applicable law," *id.* Lamps Plus's motion to compel arbitration contended that the agreement authorized arbitration only of individual claims and prohibited Mr. Varela from asserting claims on behalf of a class. Mr. Varela opposed arbitration on numerous grounds, including that his claims were outside the agreement's scope and that the agreement was unconscionable. He also contended that the agreement, if applicable and valid, permitted class arbitration.

The district court rejected Mr. Varela's arguments against arbitration. The court concluded that the dispute was within the arbitration agreement's scope because it arose in connection with his employment. Applying California law requiring a showing of both procedural and substantive unconscionability to set aside a contract, the court found the agreement procedurally unconscionable because it was an adhesion contract imposed as a condition of employment, but not substantively unconscionable because it did not require

excessive fees, its remedial provisions were not unfairly one-sided, and it did not unduly curtail discovery.

The court also found that the agreement authorized class arbitration. The court recognized that, under *Stolt-Nielsen*, a party may not be compelled to participate in class arbitration absent a contractual basis for concluding that it agreed to do so. Pet. App. 21a. The court determined that the language of the agreement was ambiguous as to whether it allowed arbitration of class claims. Construing that ambiguity against Lamps Plus as the drafter of the agreement, the court concluded that there was a contractual basis for class arbitration. *Id.* at 22a. The court also noted that a waiver of class claims "in the employment context would likely not be enforceable" under the National Labor Relations Act (NLRA), *id.* (citing *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *rev'd*, 138 S. Ct. 1612 (2018)), but its ruling did not rest on that point.

Based on these rulings on the agreement's validity and proper construction, the court granted Lamps Plus's motion to compel arbitration without limiting its order to Mr. Varela's individual claims. The court further granted Lamps Plus's motion to dismiss Mr. Varela's claims, without prejudice. *Id.* at 23a.

Lamps Plus appealed, arguing that it was aggrieved by the district court's refusal to limit its order compelling arbitration to Mr. Varela's individual claims. The Ninth Circuit affirmed in an unpublished, non-precedential opinion, finding that the parties had agreed to class arbitration. *Id.* at 2a.[1]

---

[1] Relying on *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *rev'd sub nom. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), which postdated the district court's decision, Mr. Varela

(*Footnote continued*)

The court began by recognizing that, under *Stolt-Nielsen*, parties may be compelled to arbitrate on a class basis only if they have contractually agreed to do so. *Id.* The court also observed that the agreement's failure expressly to mention class arbitration was not dispositive under *Stolt-Nielsen*; rather, the question was whether the contract was properly interpreted to embody an agreement on class arbitration. *Id.*

To determine whether the contract permitted class arbitration, the court applied "state-law contract principles," which govern interpretation of arbitration agreements. *Id.* (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Consistent with California contract-law principles, the court first considered the text of the contract and found significant support for class arbitration. The court focused on the contract's distinctive language providing for arbitration "in lieu of any and all lawsuits or other civil legal proceedings," together with other broad language including permission to assert all claims and obtain all remedies available at law. *Id.* at 3a–4a. The court pointed out that class claims and remedies would have been available to Mr. Varela in court, and that the phrase "civil legal proceedings" encompasses "class proceedings." *Id.* The court did not find the agreement unambiguous, but concluded that its terms, taken together, "can be reasonably read to allow for class arbitration." *Id.* at 3a.

Because the contract was "capable of two or more constructions, both of which are reasonable," *id.* (quoting *Powerine Oil Co. v. Super. Ct.*, 118 P.3d 589, 598

---

argued on appeal that the agreement would be unlawful under the NLRA if it allowed only individual arbitration. The court, however, did not address that issue.

(Cal. 2005)), the court applied the California contract-law principle that "[a]mbiguity is construed against the drafter" of a contract—"a rule that 'applies with peculiar force in the case of a contract of adhesion,'" *id.* (quoting *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 514 (Cal. 2016)). The court concluded that "the construction posited by Varela"—"that the ambiguous Agreement permits class arbitration"—was proper under California contract law and supplied "the necessary 'contractual basis' for agreement to class arbitration" under *Stolt-Nielsen*. *Id.* at 4a–5a.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction because this case was not properly in the court of appeals. The district court's decision had two parts. Neither was properly appealable by Lamps Plus. The first part compelled arbitration under 9 U.S.C. § 4. The FAA expressly prohibits appeal of orders directing arbitration under section 4, *see* 9 U.S.C. § 16(b)(2), and Lamps Plus's contention that the order directing arbitration is really an order *refusing* to direct the arbitration it wanted distorts the plain meaning of the statute.

The district court also granted Lamps Plus's request that Mr. Varela's claims be dismissed without prejudice. Lamps Plus argues that the dismissal is a final, appealable decision under 9 U.S.C. § 16(a)(3). Even assuming the dismissal of Mr. Varela's claims is "final," however, Lamps Plus lacks standing to appeal it because Lamps Plus is not aggrieved by it and does not seek to set it aside. That order in Lamps Plus's favor does not allow it to appeal the unappealable order compelling arbitration.

If the Court reaches the merits, it should affirm. The FAA does not preempt the lower courts'

application of California contract law principles to determine that the agreement at issue permits class arbitration proceedings because the FAA does not displace generally applicable state contract-law rules. On the contrary, it *requires* their application to arbitration agreements in the same way they are applied to other contracts. This Court's decisions concerning class arbitration thus hold that the determination whether an arbitration provision permits class proceedings must be based on generally applicable principles of contract interpretation used to discern the terms of the parties' agreement.

The FAA does not preempt the California contract-law principles applied in this case. California law, like contract law generally, seeks to ascertain the intent of contracting parties as objectively manifested in their agreement. The common meaning of the words used in a contract control, but if meaning is ambiguous and the ambiguity cannot be resolved through other means, the ambiguity is construed against the party that drafted the agreement and created the ambiguity.

These principles apply generally to contracts subject to California law—including arbitration agreements. Such generally applicable interpretive principles are not preempted by the FAA because they comply with its fundamental requirement of equal treatment of arbitration agreements and other contracts. They do not disfavor arbitration agreements because they are not triggered by distinctive features inherent in arbitration agreements.

Whether the lower courts correctly applied these neutral principles is a question of state law ill-suited to resolution by this Court. Only if this Court is convinced that a court would not have applied them to a non-

arbitration agreement in the same way may it find a violation of the FAA. There is no basis for such a finding here because the lower courts correctly focused on distinctive language in the arbitration provisions that supports the conclusion that they are not limited to bilateral proceedings and are reasonably read to allow class arbitration. Lamps Plus's contrary view founders on the contractual language, the agreement's incorporation of procedural rules that authorize class proceedings, and its express provision delegating matters concerning its interpretation to the arbitrator.

Lamps Plus's fallback assertion that the Court should adopt a new rule requiring clear and unmistakable language authorizing class arbitration is not properly before the Court because it was neither raised and decided below nor presented by the petition for certiorari. Lamps Plus's policy arguments against class arbitration are likewise misplaced because this case is not about the circumstances under which class arbitration does or does not satisfy due process, but only about whether the parties agreed to authorize an arbitrator to consider certifying a class. Nor does this case involve whether employees are better off litigating in court or arbitrating: The sole issue here is what kind of arbitration they agreed to. Finally, Lamps Plus's belated assertion that the availability of class arbitration is a question of arbitrability that is presumptively for a court to decide takes it nowhere, because it already received a decision on that question by the courts—even though the agreement it drafted delegates questions of arbitrability to the arbitrator.

ARGUMENT

I. This Court lacks jurisdiction because the district court's orders were not appealable.

This Court's jurisdiction depends on whether a case was properly "in" the court of appeals. 28 U.S.C. § 1254; *see, e.g.*, *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554–55 (2014); *Hohn v. United States*, 524 U.S. 236, 241 (1998); *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); *United States v. Nixon*, 418 U.S. 683, 690 (1974). When a court of appeals has decided an appeal over which it lacked jurisdiction, this Court likewise lacks jurisdiction to address the merits and may only vacate the judgment of the court of appeals and remand for dismissal of the appeal. *See, e.g.*, *Will v. Hallock*, 546 U.S. 345, 349, 355 (2006).

A. The FAA precludes appeals of orders compelling arbitration.

The district court in this case compelled arbitration on the motion of Lamps Plus. The FAA permits appeals from *denials* of motions to order arbitration, *see* 9 U.S.C. § 16(a)(1)(B), but explicitly prohibits appeals from interlocutory orders directing arbitration to proceed. 9 U.S.C. § 16(b)(2). A court of appeals may not consider an appeal's merits in the face of such an express statutory denial of jurisdiction. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

The FAA is designed "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). Accordingly, "Congress sought to prevent parties from frustrating arbitration through lengthy preliminary appeals." *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d

727, 730 (4th Cir. 1991). Thus, in general, "a party cannot appeal a district court's order unless, at the end of the day, the parties are forced to settle their dispute other than by arbitration." *Augustea Impb Et Salvataggi v. Mitsubishi Corp.*, 126 F.3d 95, 99 (2d Cir. 1997). Appellate courts routinely refuse appeals from interlocutory orders requiring arbitration. *See, e.g.*, *Preferred Care of Del., Inc. v. Estate of Hopkins*, 845 F.3d 765, 768 (6th Cir. 2017).

Attempting to skirt the FAA's limits on appellate jurisdiction, Lamps Plus characterizes the district court as having "effectively *denied* Lamps Plus's motion to compel arbitration." Pet. Br. 31. Although Lamps Plus's motion to compel arbitration argued that the court should direct that arbitration take place in a particular manner, the relief sought in the motion was an order compelling arbitration under the parties' agreement, *see* Pet. Br. 31, and that is exactly what the district court ordered based on its construction of the agreement. There is no doubt that the district court directed arbitration to proceed, and that it did so based upon its authority under 9 U.S.C. § 4. And the FAA's text is plain: "[A]n appeal may not be taken from an interlocutory order ... directing arbitration to proceed under section 4 of this title." 9 U.S.C. § 16(b)(2).

Lamps Plus appears to suggest that section 16(b)(2)'s cross reference to section 4, which authorizes courts to compel arbitration "in the manner provided for in [the parties'] agreement," 9 U.S.C. § 4, means that a party is free to appeal an order compelling arbitration as long as it claims that the order did not conform with the parties' agreement. That view would create a gigantic loophole in section 16(b)(2), and Lamps Plus unsurprisingly offers no support for it.

The straightforward meaning of section 16(b)(2) is that it precludes appeals from orders in which district courts exercise their section 4 authority to compel arbitration, not that it precludes appeals only if they do so correctly. Thus, courts of appeals agree that they lack jurisdiction over appeals from orders that compel arbitration, "albeit not in the first-choice" manner of the party that moved to compel. *Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 814 F.3d 300, 304 (5th Cir. 2016); *see also Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co.*, 671 F.3d 635, 637–38 (7th Cir. 2011).

In *Al Rushaid*, the Fifth Circuit considered whether it had appellate jurisdiction over an order that compelled arbitration but denied the defendant's request that arbitration take place before the International Chamber of Commerce. *Id.* at 303. Concluding that the appeal would frustrate section 16's purpose of promoting arbitration, the court held that it lacked jurisdiction. *Id.* at 304; *see also Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1154 (9th Cir. 2004) (holding that the court lacked jurisdiction over an appeal of an order compelling arbitration in front of one tribunal rather than another); *Augustea*, 126 F.3d at 98 (holding that the court lacked jurisdiction over an appeal of an order to arbitrate in London instead of New York).

Similarly, in *Blue Cross*, the Seventh Circuit held that an order denying a motion to direct arbitrators to "hold separate rather than consolidated proceedings" was not a refusal to "order arbitration to proceed" appealable under 9 U.S.C. § 16(a)(1)(B), 671 F.3d at 638, even though the moving party described its motion as a petition "to compel a de-consolidated arbitration," *id.* at 636. As then-Chief Judge Easterbrook explained, an order that *allows* arbitration to proceed, though not in

the manner a party prefers, is not appealable regardless of a party's "artful pleading": Calling such an order a refusal to direct arbitration to proceed "does not make it so." *Id.* at 638; *see also id.* ("Unlike Humpty Dumpty, ... a litigant cannot use words any way it pleases. ... Abraham Lincoln once was asked how many legs a donkey has if you call its tail a leg. His answer was four: calling a tail a leg does not make it one.").

The reasoning of the courts of appeals in these cases is correct and applicable here. If parties may appeal every order directing arbitration that does not comport with their wishes, the FAA's policy of "rapid and unobstructed enforcement of arbitration agreements" will be thwarted. *Moses H. Cone*, 460 U.S. at 22. Indeed, under Lamps Plus's reasoning, a plaintiff that sought class arbitration could characterize an order compelling individual arbitration as a denial of its request that the court direct class arbitration. Appeals of orders directing arbitration would proliferate, and parties could engage in lengthy appellate litigation over the proper forum and location, the proper arbitrator, and the proper arbitration procedures before the arbitration even began. *See Blue Cross*, 671 F.3d at 638.

B. Lamps Plus lacks standing to appeal the district court's dismissal order, which it sought and does not challenge.

Recognizing the weakness of its argument that the district court refused to order arbitration, Lamps Plus relies principally on the assertion that the district court's order is an appealable "final decision with respect to an arbitration," 9 U.S.C. § 16(a)(3), because the district court dismissed Mr. Varela's claims without prejudice. Even assuming the dismissal was a final order, however, Lamps Plus lacks standing to appeal it

because it provided precisely the relief Lamps Plus sought—dismissal of its opponent's claims—and Lamps Plus does not seek to overturn it.

Lamps Plus relies on *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), where this Court found that a plaintiff whose claims were dismissed with prejudice in favor of arbitration could appeal the dismissal under section 16(a)(3). The Court adopted the "well-developed and longstanding meaning" of "the term 'final decision'" in decisions construing 28 U.S.C. § 1291, which likewise confers appellate jurisdiction over "final decisions" of district courts. *Id.* at 86. The Court deemed the dismissal with prejudice final because it "disposed of the entire case on the merits" and left the court "nothing to do but execute the judgment." *Id.* (citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994), *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), and *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

It is a great leap from the proposition that a plaintiff can appeal a decision that finally, and over its objections, dismisses its own claims with prejudice to the assertion that a defendant can appeal the dismissal without prejudice of the plaintiff's claims—a dismissal that it affirmatively sought and does not seek to overturn. Even assuming the dismissal is nominally final, well-established principles of appellate practice developed under 28 U.S.C. § 1291's parallel authorization of appeals from final orders preclude the exercise of jurisdiction over a defendant's attempt to appeal an order granting its own motion to dismiss.[2]

---

[2] Because the dismissal was without prejudice it did not, unlike the order in *Randolph*, end the litigation *on the merits*. And

(*Footnote continued*)

This Court and the lower courts have long held that a party may not appeal a favorable decision. As this Court has put it, "[o]nly one injured by the judgment sought to be reviewed can appeal," and a party is "not ... injured by [a case's] termination in his favor." *Parr v. United States*, 351 U.S. 513, 516–17 (1956); *see also Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1717 (2017) (Thomas, J., concurring in the judgment); *Mathias v. Worldcom Techs., Inc.*, 535 U.S. 682 (2002); *California v. Rooney*, 483 U.S. 307, 311 (1987). Thus, courts regularly reject a defendant's effort to appeal from a dismissal of its opponent's claims, unless the defendant asserts that a dismissal without prejudice should have been with prejudice. *See, e.g., Rodriguez v. 32d Leg. of V.I.*, 859 F.3d 199, 207 (3d Cir. 2017); *Swatch Group Mgmt. Servs. v. Bloomberg L.P.*, 756 F.3d 73, 92–93 (2d Cir. 2014); *Concerned Citizens of Cohoctin Valley, Inc. v. N.Y. State Dep't of Env'tl Conservation*, 127 F.3d 201, 204 (2d Cir. 1997); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1095 & n.10 (11th Cir. 1996); *see also Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 647 & n.4 (D.C. Cir. 1998); *H.R. Techs., Inc. v. Astechnologies, Inc.*, 275 F.3d 1378, 1382–83 (Fed. Cir. 2002).[3]

---

it resulted in no "judgment" that could be "executed." Its effect was no different than if the court had merely stayed the claim after directing arbitration to proceed. Nonetheless, some circuits have extended *Randolph* to allow appeals by plaintiffs whose claims have been dismissed without prejudice in favor of arbitration. *See, e.g., Interactive Flight Techs., Inc. v. Swissair Swiss Air Transport Co.*, 249 F.3d 1177 (9th Cir. 2001). Assuming their correctness, such decisions do not address an appeal by a *defendant* who procures dismissal without prejudice of the plaintiff's claims.

[3] This Court has recognized that an appeal from a final order dismissing an opponent's claims may lie in the unusual instance where the order incorporates adverse rulings with preclusive or

(*Footnote continued*)

Here, the dismissal granted Lamps Plus the relief it sought with respect to Mr. Varela's claims. Lamps Plus does not claim entitlement to a different form of dismissal; it does not challenge the dismissal at all. The relief it seeks on appeal—an addition to the order granting its motion to compel arbitration specifying that arbitration is limited to Mr. Varela's individual claims—would not affect the validity of the dismissal or alter it in any way. Lamps Plus thus lacked standing to appeal the dismissal, even assuming its finality.

Moreover, the mere existence of an arguably final dismissal favorable to Lamps Plus does not transform the unappealable and nonfinal order compelling arbitration into an appealable order. This Court recently held that a party cannot manufacture finality of an otherwise unappealable interlocutory order by engineering a case's dismissal—even where, unlike here, the dismissal is with prejudice and, unless overturned, irrevocably terminates the appealing party's claims. *Microsoft*, 137 S. Ct. at 1712–15; *see also Keena v. Groupon, Inc.*, 886 F.3d 360, 364–65 (4th Cir. 2018) (holding that a plaintiff cannot make an order compelling arbitration appealable by moving to dismiss its own claims). If a plaintiff may not use an order it requested dismissing its claims as a vehicle to appeal an otherwise unappealable interlocutory order, it should follow that a defendant likewise may not use the grant of its request that the plaintiff's claims be dismissed to appeal such an order.

Permitting an appeal in such circumstances allows manipulation and evasion of the limits Congress placed

---

precedential effect on the prevailing party in future proceedings, *see Camreta v. Greene*, 563 U.S. 692, 702–09 (2011), but a district court's dismissal without prejudice has no such effect.

on appeals in matters involving arbitration. The FAA both prohibits appeals of orders directing arbitration and provides that when a plaintiff has attempted to assert arbitrable claims in court, a district court shall stay those claims pending arbitration. *See* 9 U.S.C. § 3. Such a stay is not a final, appealable order. *Randolph*, 531 U.S. at 87 n.2. The courts of appeals agree that staying rather than dismissing arbitrable claims is ordinarily the correct course, and some go further and hold that dismissal is improper. *See Katz v. Cellco P'ship*, 794 F.3d 341, 344–47 (2d Cir. 2015) (outlining positions of various circuits and adopting the view that dismissal is improper). In *Katz*, the Second Circuit held that allowing courts discretion to dismiss is inconsistent with the FAA's policy of restricting appeals of orders compelling arbitration because "[a]ffording judges such discretion would empower them to confer appellate rights expressly proscribed by Congress." *Id.* at 347. This Court need not go so far here—indeed, it cannot, because no party has sought to overturn the dismissal order on appeal. But the same argument against allowing the manufacturing of appellate rights applies even more strongly here, where it is only the happenstance of the district court's ordering relief *for* Lamps Plus (dismissal of Mr. Varela's claims) that is *more* favorable than the relief that the FAA authorizes (a stay) that provides the ostensible basis for appeal. That order in Lamps Plus's favor does not permit it to appeal the otherwise unappealable order compelling arbitration.

II. The FAA does not preempt application of state contract-law principles to determine whether an agreement permits class proceedings.

A. The FAA is premised on state contract law.

The FAA requires enforcement of contractual obligations to arbitrate, but it does not federalize contract law. Section 2 of the FAA, 9 U.S.C. § 2, provides that provisions for arbitration in contracts involving interstate commerce are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The statute does not, however, define what a contract is, how it is formed, how its terms are construed, or what defenses may exist to its enforcement. In all those respects, the statute relies on application of principles that already "exist at law or in equity."

Because "[t]here is no federal general common law," *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), the basic principles of contract law that the FAA presupposes are in almost all cases supplied by state common and statutory law. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015); *First Options*, 514 U.S. at 944; *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474–75 (1989). As this Court has construed the FAA, it does not supplant state contract-law principles, but overlays on them a federal-law requirement that contracts calling for arbitration be "as enforceable as other

contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).[4]

In other words, the FAA's main effect on state contract law is to "establish[] an equal-treatment principle." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). Under this principle, states may not subject arbitration provisions to "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* (citation omitted). "The FAA thus preempts any state rule discriminating on its face against arbitration," and "also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that ... have the defining features of arbitration agreements." *Id.*

Within this constraint, state contract law continues to govern arbitration provisions just as it governs other contracts: The FAA does not "purport[] to alter background principles of state contract law regarding the scope of agreements." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009). Indeed, because the FAA is premised on the existence of an enforceable contract, it imposes no obligations to arbitrate beyond those that a party has assumed under a contract, as determined by the application of neutral principles of state contract law. As this Court has emphasized, "the

---

[4] Cases involving collective bargaining agreements, which are governed by federal statutory and common law, are an exception to the rule that generally applicable state contract law governs arbitration agreements. *See, e.g., Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957). Arbitration provisions in contracts exclusively governed by federal common law, *see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), would be another exception, although such contracts are rare, *see Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 691–92 (2006).

FAA does not require parties to arbitrate when they have not agreed to do so"; it "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt*, 489 U.S. at 478. Whether the parties have entered into an agreement, what the agreement covers, and what procedures it calls for are all matters of contract. *See id.* at 479. As long as state contract law adheres to the FAA's equal-treatment principle, *see Kindred*, 137 S. Ct. at 1426, it governs decisions on such matters because "the interpretation of private contracts is ordinarily a question of state law," *Volt*, 489 U.S. at 474.

B. This Court's decisions recognize that state contract law governs the determination whether an arbitration agreement authorizes class proceedings.

1. This Court's holdings concerning class arbitration represent a specific application of the foregoing principles, not a distinct doctrine that supplants state contract law. The Court established its approach in *Stolt-Nielsen*, where an arbitral panel had held that class arbitration was permissible based on "its own policy preference" for class proceedings, 559 U.S. at 676, even though the parties themselves stipulated that their contract did not incorporate "any agreement on the issue of class arbitration," *id.* at 673. In line with the fundamental norm that a contractual undertaking to arbitrate is the touchstone of section 2's requirement that arbitration provisions be enforced, the Court held in *Stolt-Nielsen* that the FAA required that the arbitrators' decision be set aside because the statute does not permit class arbitration to be imposed on the parties without a "contractual basis for concluding that [they] *agreed* to do so." 559 U.S. at 682.

As the Court put it, "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Id.* *Stolt-Nielsen* thus concluded that requiring class arbitration because of policy considerations divorced from what the parties agreed to—or doing so solely because the parties agreed to arbitrate, without considering whether they agreed to class arbitration—violates the FAA's prescription that parties are required to arbitrate only when a contract obligates them to do so. *See id.* at 674–77, 685. Moreover, because "class-action arbitration changes the nature of arbitration," it "cannot be presumed" that agreeing to arbitrate is the same as agreeing to class arbitration. *Id.* at 685.

In so holding, the court acknowledged that "the interpretation of an arbitration agreement is generally a matter of state law." *Id.* at 681. Determination of that state-law question, of course, remains subject to the FAA's overarching axiom that arbitration is a matter of agreement, *see id.*, and to the equal-treatment principle requiring that the issue be determined under neutral, generally applicable contract-law rules, *see Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (cited in *Stolt-Nielsen*, 559 U.S. at 681). Otherwise, *Stolt-Nielsen* left what it held to be the determinative question—"whether the parties *agreed to authorize* class arbitration," 559 U.S. at 687—to be determined by the same state-law contract principles that determine whether parties have agreed to anything else.

Stolt-Nielsen's statement that the "intentions" of the parties are "control[ling]," *id.* at 682, reinforces that the determination whether a contract permits class arbitration depends on state contract-law rules

that ordinarily structure inquiries into the meaning of contracts. *Stolt-Nielsen*'s references to ascertaining the "parties' intentions" are a shorthand way of describing the set of considerations governing interpretation not only of arbitration agreements, but of "any other contract" as well. *Id.* at 682 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)). In a broad sense, all principles of contract interpretation shape "the attempt 'to ascertain the intention of the parties'" manifested in the contract. *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 935 (2015) (emphasis removed) (quoting 11 Williston on Contracts § 30:2 (4th ed.)). *Stolt-Nielsen* calls for application of those generally applicable interpretive principles, not a freewheeling inquiry into the parties' subjective intentions untethered to contract law.

Stolt-Nielsen recognizes that ascertaining contractual intent often involves application of legal doctrines aimed, for example, at resolving ambiguities in contractual language. *See* 559 U.S. at 674 n.6. Thus, in holding that "the FAA requires" a determination "whether the parties *agreed to authorize* class arbitration," *id.* at 687, *Stolt-Nielsen* calls for nothing more (or less) than the use of applicable contract-law principles to determine "'the contractual rights and expectations of the parties'" with respect to class arbitration. *Id.* at 682 (quoting *Volt*, 489 U.S. at 479). Those principles will in almost every case be state-law principles, *id.* at 681, which, under the FAA, govern the determination of parties' contractual rights unless they disfavor arbitration. *See Perry*, 482 U.S. at 492 n.9.[5]

---

[5] *Stolt-Nielsen* itself might have been a rare case where applicable contract-law principles would not have come from state law,

(*Footnote continued*)

2. The Court reiterated *Stolt-Nielsen*'s holding in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). There, the Court succinctly described *Stolt-Nielsen* as holding that the FAA prohibits "imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation." *Id.* at 347. At the same time, the Court acknowledged that parties "may and sometimes do agree to aggregation" and that, when they do, the FAA requires enforcement of such agreements because "arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *Id.* at 351. Throughout, *Concepcion* stressed the contractual nature of FAA arbitration, *see, e.g.*, *id.* at 344, and it acknowledged the FAA's preservation of state contract-law doctrines that "place arbitration agreements on an equal footing with other contracts." *Id.* at 339.

Concepcion extended *Stolt-Nielsen* by holding that the FAA preempted a state-law rule prohibiting waiver of the right to participate in class proceedings because it "interfere[d] with arbitration," *id.* at 346, and presented "an obstacle to the accomplishment of the FAA's objectives," *id.* at 343. The anti-waiver rule, the Court concluded, evinced hostility to arbitration by preventing parties from agreeing to bilateral arbitration, which the Court saw as the principal form of

---

as it was arguable that general maritime law, a form of federal common law, *see Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996), governed the parties' contract, *see Stolt-Nielsen*, 559 U.S. at 673. The Court did not have to resolve that issue because the arbitrators had not decided the class-arbitration issue on the basis of *any* form of contract law. *See id.* at 673. In this case, by contrast, there is no dispute that the parties' contract is governed by California state law.

"arbitration as envisioned by the FAA," *id.* at 351, and by effectively requiring classwide arbitration without a contractual basis, *id.* at 346.

Concepcion, in sum, held that the FAA requires enforcement of agreements prohibiting class arbitration as well as agreements allowing it. Class arbitration, the Court held, may not be "manufactured" on the basis of doctrines not rooted in contractual rights and obligations, but must be "consensual." *Id.* at 348. That is, class arbitration must be based on "the arbitration agreement itself or some background principle of contract law that would affect its interpretation," *id.* at 347, provided that the state-law principle does not "disfavor[] arbitration," *id.* at 341.

3. The Court's decision in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013), confirms this understanding of *Stolt-Nielsen* and *Concepcion*. In *Oxford Health*, a plaintiff sought to proceed on behalf of a class after being compelled to arbitrate under an agreement providing that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration ...." *Id.* at 566. The parties agreed to submit the question whether their agreement allowed class arbitration to the arbitrator, who concluded that the agreement authorized class arbitration because it provided for arbitration of "all" the disputes that otherwise could have been brought as a "civil action," including class disputes. *Id.* at 567.

The defendant in *Oxford Health*, like Lamps Plus here, argued that the arbitrator's decision violated the FAA as construed in *Stolt-Nielsen* because it ordered class arbitration "without a sufficient contractual basis." *Id.* at 571. That argument, the Court held,

fundamentally "misread[] *Stolt-Nielsen*." *Id.* at 571. As the Court explained, *Stolt-Nielsen* did not rest on the absence of a "sufficient" contractual basis for class arbitration. *Id.* Rather, the Court emphasized, the outcome in *Stolt-Nielsen* followed from the fact that "[t]he parties in *Stolt–Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration." *Id.* *Stolt-Nielsen* held that the FAA prohibits requiring class arbitration in the absence of "*any* contractual basis for ordering class procedures." *Id.* Under *Stolt-Nielsen*, an order regarding class arbitration violates the FAA if it rests neither on "a determination regarding the parties' intent," nor on a neutral "default rule" of contract law. *Id.*

In *Oxford Health*, the arbitrator complied with the FAA's requirement that he "construe the parties' contract," *id.*, in determining the availability of class arbitration. Because the arbitrator's determinations were, "through and through, interpretations of the parties' agreement," *id.* at 570, he did not exceed his powers under the FAA. And given the arbitrator's compliance with the FAA's core requirement, the Court did not proceed to consider whether the arbitrator was right or wrong—whether he "misapprehended the parties' intent," *id.* at 571. The Court held that it lacked authority to review the *correctness* of the arbitrator's interpretation of the contract because, with respect to matters properly submitted to an arbitrator, the FAA limits judicial review and does not permit vacatur of an arbitrator's decision for mere error. *Id.* at 568–69.

Although this last feature of *Oxford Health* is not present in this case, the decision is highly instructive as to the limits of the FAA's commands concerning class arbitration. The FAA requires that the

availability of class arbitration be determined as a matter of the contractual obligations assumed by the parties, in light of the terms of their agreement construed under principles of contract law that satisfy the FAA's equal-treatment principle. And just as the FAA does not make the correctness of an arbitrator's decision on that matter a question of law for a court to decide, so it does not transform into a question of *federal* law the correctness of a court's use of neutral *state-law* principles to interpret an arbitration agreement. Absent a violation of the equal-treatment principle, the interpretation of an arbitration agreement remains, as this Court stated in *Volt*, "a question of state law, which this Court does not sit to review." 489 U.S. at 474.

III. The California contract-law principles applied by the lower courts in this case are consistent with the FAA.

The courts below applied well-settled principles of California contract law to determine whether, in entering into the arbitration agreement at issue, the parties agreed to permit class arbitration. That determination was fully consistent with this Court's holdings in *Stolt-Nielsen*, *Concepcion*, and *Oxford Health* that a decision that class arbitration is permissible must rest on a "contractual basis," *Oxford Health*, 569 U.S. at 571, reflecting that the parties "*agreed to authorize* class arbitration," *Stolt-Nielsen*, 559 U.S. at 687. The California contract-law rules the courts applied to reach that determination satisfy the FAA's equal-treatment principle because they do not "apply only to arbitration or ... derive their meaning from the fact that an agreement to arbitrate is at issue," *Concepcion*, 563 U.S. at 339, nor do they "disfavor[] contracts that ... have the

defining features of arbitration agreements," *Kindred*, 137 S. Ct. at 1426.

A. Interpretive principles of California contract law seek to ascertain the parties' objectively manifested intent.

The California contract-law doctrines applied below are fully consistent with this Court's emphasis on the "consensual basis of arbitration" under the FAA, *Stolt-Nielsen*, 559 U.S. at 687, as well as the Court's statements that in interpreting an arbitration agreement, "as with any other contract, the parties' intentions control," *id.* at 682 (quoting *Mitsubishi*, 473 U.S. at 626). Under California law, "[t]he fundamental goal of contract interpretation is to give effect to the mutual intention of the parties." *Bank of the West v. Super. Ct.*, 833 P.2d 545, 552 (Cal. 1992). This basic principle is enshrined in a statute providing that "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Cal. Civ. Code § 1636.

As in most jurisdictions, the inquiry into contractual intent under California contract law does not focus on the parties' subjective intentions, but on "the objective manifestation of the parties' intent" as found in "the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding." *Reigelsperger v. Siller*, 150 P.3d 764, 767 (Cal. 2007) (citation omitted); *see also Patel v. Liebermensch*, 197 P.3d 177, 183 (Cal. 2008); *People v. Shelton*, 125 P.3d 290, 294 (Cal. 2006); *Brant v. Calif. Dairies, Inc.*, 48 P.2d 13, 16 (Cal. 1935).

Under this conventional approach, the parties' "intent is to be inferred, if possible, solely from the written

provisions of the contract." *AIU Ins. Co. v. Super. Ct.*, 799 P.2d 1253, 1264 (Cal. 1990). Thus, "[i]f contractual language is clear and explicit, it governs." *Bank of the West*, 833 P.2d at 552. Again, the rule is incorporated in California's Civil Code, which provides that "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Cal. Civ. Code § 1638. Absent evidence that parties mutually intended to use words in a technical sense or adopt a special meaning given them by usage, California courts interpret contractual words "in their 'ordinary and popular sense.'" *AIU*, 799 P.2d at 1264 (quoting Cal. Civ. Code § 1644). "Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." *Id.*

If a contract's language is ambiguous, a court must look further to determine what the parties mutually agreed. Absent extrinsic evidence that sheds light on the shared meaning ascribed by the parties to ambiguous language, *see, e.g.*, *Decter v. Stevenson Props., Inc.*, 247 P.2d 11, 17 (Cal. 1952), California law provides two principal means of determining the intention reflected in ambiguous contractual language.[6] First, ambiguity "is resolved by interpreting the ambiguous provisions

---

[6] Under California law, extrinsic evidence is relevant only if it helps determine the parties' mutual intent; the "uncommunicated subjective intent" of one of the parties is "irrelevant." *Reigelsperger*, 150 P.3d at 767; *accord*, *Brant*, 48 P.2d at 16; *Vaillette v. Fireman's Fund Ins. Co.*, 22 Cal. Rptr. 2d 807, 814 (Cal. Ct. App. 1993); *Winet v. Price*, 6 Cal. Rptr. 2d 554, 558 & n.3 (Cal. Ct. App. 1992). Here, no evidence suggests that the parties engaged in any communications that shed light on what they agreed regarding class arbitration, *see* J.A. 11–12, and Lamps Plus's unilateral, unexpressed intentions on that subject thus have no bearing on the determination of what the parties "agreed to do" with respect to class arbitration, *Stolt-Nielsen*, 559 U.S. at 684.

in the sense the promisor ... believed the promisee understood them at the time of formation." *AIU*, 799 P.2d at 1264; *see also Bank of the West*, 833 P.2d at 552; Cal. Civ. Code § 1649 ("If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."). Second, "[i]f application of [the foregoing] rule does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist." *AIU*, 799 P.2d at 1264; *accord*, *Bank of the West*, 833 P.2d at 552. The latter rule is incorporated in California Civil Code § 1654, which provides that "[i]n cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."

Particularly where form contracts are concerned, the party who caused the uncertainty to exist is the drafter. *Victoria v. Super. Ct.*, 710 P.2d 833, 839 (Cal. 1985). Thus, "ambiguities in standard form contracts are to be construed against the drafter." *Id.* at 835; *accord*, *Sandquist*, 376 P.3d at 514. Where a contract of adhesion—one offered on a take-it-or-leave-it basis with no opportunity for the weaker party to negotiate—is at issue, "ambiguities will be subject to stricter construction against the party with the stronger bargaining power." *Victoria*, 710 P.2d at 742; *accord*, *Sandquist*, 376 P.3d at 514.

B. The FAA does not preempt California's principles of contract interpretation.

There is no dispute that the lower courts in this case applied the foregoing principles of contract construction to determine whether the arbitration

provision reflected agreement to authorize class arbitration: The courts first carefully analyzed the terms of the agreement and then, finding it ambiguous on the point, construed it against the drafter, Lamps Plus. Nothing in this Court's jurisprudence suggests that the application of these legal standards to determine the meaning of the parties' agreement is preempted by the FAA.

1. The lower courts' application of California law comports entirely with *Stolt-Nielsen*'s core requirement that class arbitration requires "a contractual basis for concluding that the parties *agreed* to do so." 559 U.S. at 684. The California-law principles applied below are aimed precisely at determining what contracting parties have agreed to do. Courts applying them reach conclusions that "are, through and through, interpretations of the parties' agreement," *Oxford Health*, 569 U.S. at 570, as this Court's decisions command.

Moreover, those principles are fully consistent with the Court's holdings that "[a]rbitration under the [FAA] is a matter of consent." *Volt*, 489 U.S. at 479. The state-law rules involved here are directed at determining the "intent of the parties," *Stolt-Nielsen*, 559 U.S. at 684, in the sense in which intent is relevant to their "contractual rights and expectations," *id.* at 682 (quoting *Volt*, 489 U.S. at 479). That is, California contract law is aimed at determining the mutual intentions of the parties as objectively manifested in their contract. *See Bank of the West*, 833 P.2d at 552.

California's approach to determining the intentions expressed in contracts generally, and ambiguous contracts in particular, is consistent with norms of contract interpretation that prevail in most states. The

reliance on objectively manifested intent rather than unexpressed subjective intent, the primacy of unambiguous text as the expression of that intent, and the use of various means, including construction against the drafter, or "*contra proferentem*," to determine contractual intent in cases of textual ambiguity—all these are widely accepted principles of contract interpretation. *See* 11 Williston on Contracts §§ 31.4, 30:4, 30:7, 31:12, 32:12. Such principles of interpretation and construction of contracts are the tools courts use to "ascertain the intention of the parties" as "expressed or implied" in the contract. *Id.* § 30:2.

Stolt-Nielsen itself recognized that such interpretive doctrines, as distinct from policy preferences that do not reflect the meaning of the parties' agreement, are essential to determining the contractual rights and expectations on which the availability of class arbitration procedures depends. The Court, for example, criticized the arbitrators in that case for relying on policy arguments concerning the utility of class proceedings rather than on rules for "determining the parties' intent when an express agreement is ambiguous." 559 U.S. at 675 n.6. The Court also recognized that contractual rights with respect to arbitration, like other subjects of contracts, may depend on applicable "default rules" and "background principle[s]." *Id.* at 673, 685; *see also Oxford Health*, 569 U.S. at 571. Indeed, *Stolt-Nielsen* did not rule out use of *any* principles of contract interpretation to determine the availability of class arbitration: It foreclosed only determinations that are *not* based on a construction of the parties' contract. *See Stolt-Nielsen*, 559 U.S. at 684, *Oxford Health*, 569 U.S. at 571.

2. This Court's FAA jurisprudence also demands that any state-law contract principles applied to an arbitration agreement be generally applicable and that they not disfavor arbitration. *Kindred*, 137 S. Ct. at 1426. The California-law principles applied in this case readily clear those hurdles.[7]

There is no doubt that the rules of interpretation at issue here are generally applicable—that is, that they "apply to 'any' contract." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. at 1622. In *Sandquist v. Lebo Automotive, Inc.*, the California Supreme Court described the interpretive rule that was dispositive here—that ambiguous contractual provisions are construed against the drafter—as a "general principle of contract interpretation" that "applies equally to the construction of arbitration provisions." 376 P.3d at 514. Moreover, the California statutes that codify the relevant principles are expressly applicable to all contracts: The part of the Civil Code in which those provisions are found—entitled "Interpretation of Contracts," Cal. Civ. Code div. 3, pt. 2, t. 3—begins with a provision stating that "[a]ll contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code." Cal. Civ. Code § 1635. None of the Code sections setting forth the principles applicable here differentiates between arbitration agreements and other contracts.

---

[7] To the extent the FAA also requires states to apply state contract law to questions about the *scope* of arbitrable issues with "due regard ... to the federal policy favoring arbitration," *Volt*, 489 U.S. at 476, California law also accords with that requirement, *see Sandquist*, 376 P.3d at 519, and the district court in this case applied that principle in finding the parties' dispute to be within the scope of the agreement, a question not at issue here.

Nor do the principles applied in this case "disfavor[] contracts that ... have the defining features of arbitration agreements." *Kindred*, 137 S. Ct. at 1426. The rules that the parties' mutual intentions are determined by their objective manifestation in a contract's terms and that ambiguities not otherwise resolvable are to be construed against the drafter do not "hing[e] on the primary characteristic[s] of an arbitration agreement." *Id.* at 1427. Ambiguity may be common in arbitration agreements, as in many other types of contracts, but it is hardly essential to their nature. Arbitration agreements, no less than contracts of other kinds, can avoid construction against the drafter by avoiding ambiguity.

Likewise, California's forceful application of the rule resolving ambiguities against the drafter to ambiguities in contracts of adhesion, *Sandquist*, 376 P.3d at 514, does not "covertly" discriminate against arbitration, *Kindred*, 137 S. Ct. at 1426. Although arbitration provisions affecting employees and consumers are commonly contracts of adhesion, that feature does not distinguish them from contracts in general. As this Court noted in *Concepcion*, contracts of adhesion are ubiquitous, 563 U.S. at 346–47, and "States remain free to take steps addressing the concerns that attend contracts of adhesion" even though such steps may apply to arbitration agreements in common with other adhesive contracts, *id.* at 347 n.6.

In short, the contract-law principles applied in this case are not "too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment." *Kindred*, 137 S. Ct. at 1427. They do not

apply only to "a slim set of both patently objectionable and utterly fanciful contracts." *Id.* They "in fact apply generally," *id.* at 1428 n.2, to the full range of contracts subject to California law, not just to "arbitration agreements and black swans." *Id.* at 1428.

3. This Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), confirms that the FAA does not preempt the doctrine that ambiguities are construed against the drafter. *Mastrobuono* concerned whether an arbitration agreement authorized the award of punitive damages. Applying the basic principle that arbitration is a matter of contract, *id.* at 57 (citing *Volt*, 489 U.S. at 476), the Court stated that "the case before us comes down to what the contract has to say about the arbitrability of [a] claim for punitive damages." *Id.* at 58. The agreement did not expressly authorize punitive damages, and the Court found it ambiguous in light of provisions that pointed in both directions on the issue. On one hand, the agreement said it was governed by New York law, and New York law purported to prohibit punitive damages in arbitration. On the other hand, the agreement incorporated NASD rules, which allowed "damages and other relief," terms that, "[w]hile not a clear authorization of punitive damages," "appear[ed] broad enough at least to contemplate such a remedy." *Id.* at 61. The Court resolved the ambiguity in favor of allowing punitive damages in part because the parties opposing punitive damages had drafted the agreement; the Court held that they "cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Id.* at 62.

Notably, the Court derived this rule from the common law of the two *states* whose laws were "arguably relevant to this controversy." *Id.* at 63 n.9. The Court explained its application of this state-law rule to the arbitration agreement as follows:

> Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result. That rationale is well suited to the facts of this case. As a practical matter, it seems unlikely that petitioners were actually aware of New York's bifurcated approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right. In the face of such doubt, we are unwilling to impute this intent to petitioners.

Id. at 63 (footnote omitted).

This Court's application of the state-law principle that ambiguities are construed against the drafter when determining the intent of the parties to an ambiguous arbitration agreement lays to rest any suggestion that the principle "singles out arbitration agreements for disfavored treatment," *Kindred*, 137 S. Ct. at 1425, or "stand[s] as an obstacle to the accomplishment of the FAA's objectives," *Concepcion*, 563 U.S. at 343. The Court's later decision in *Imburgia* likewise casts no doubt on the applicability to arbitration agreements of the rule requiring construction of ambiguous language against the drafter. *See* 136 S. Ct. at 470. The Court's observation that "the reach of the canon construing contract language against the drafter must

have limits," *id.*, refers to the very limits incorporated in California's contract-interpretation principles—namely, that the principle applies only where a court has determined that a contract is ambiguous, *id.* The principle as expressed in California law is therefore not preempted.

* * *

In sum, through the lower courts' application of California contract law, Lamps Plus got what it was entitled to under the FAA as this Court construed it in *Stolt-Nielsen*, *Concepcion* and *Oxford Health*: a determination that "there is a contractual basis for concluding that the part[ies] *agreed*" to allow class arbitration. *Stolt-Nielsen*, 559 U.S. at 684. That determination did not rest on policy considerations divorced from the parties' agreement, or on the mere existence of an arbitration agreement, but on "interpretations of the parties' agreement." *Oxford Health*, 569 U.S. at 570. And those interpretations were in turn based on generally applicable principles of state contract law that are neutral with respect to arbitration and, thus, not preempted by the FAA. The lower courts' decision complies with the requirements of the FAA.

IV. Lamps Plus's claim that the courts below misinterpreted the agreement does not establish a violation of the FAA.

A. The correctness of the courts' contract interpretation is a state-law question.

Lamps Plus's position rests on its arguments that in carrying out the analysis required by the FAA, the lower courts misread the contract. But as explained above, in requiring enforcement of contractual obligations to arbitrate, the FAA does not transform the

interpretation of an agreement to arbitrate into a question of federal law. *Volt* made the point plainly when it distinguished between the FAA's requirement that contractual obligations to arbitrate be enforced on equal terms with other contracts (a matter of federal law, *see* 498 U.S. at 478) and the underlying determination of what a particular contract means ("a question of state law, which this Court does not sit to review," *id.* at 474). Here, the lower courts complied with the FAA by basing their determination as to class arbitration on their interpretation of the contract under generally applicable principles of state law. Lamps Plus's arguments, even taken at face value, add up only to a claim of error on the state-law side of the equation—the reading of the contract.

In *Volt*, this Court lacked authority to override the California Supreme Court's state-law contract construction, because the determination of a state's highest court on a state-law matter is conclusive. *See Mastrobuono*, 514 U.S. at 60 n.4; *see also Murdock v. City of Memphis*, 87 U.S. 590, 635 (1875); *Imburgia*, 136 S. Ct. at 468. Although this Court has power to review a *federal* appellate court's decision on a state-law matter, *see Mastrobuono*, 514 U.S. at 60 n.4., there is generally little reason for it to do so, *see, e.g.*, *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). Here, there is no adequate reason.

First, Lamps Plus's question presented does not ask this Court to decide any state-law question, but only whether it violates the FAA to permit class arbitration in this case. *See* Pet. i; Pet. Br. i. A state-law question of contract construction is not fairly included in that question presented and would not have merited a grant of certiorari if it were. Second, this court typically

accepts a court of appeals' ruling on a matter of the law of a state within its circuit, *see Richards v. United States*, 369 U.S. 1, 16 n.35 (1962), and it is still more deferential to "a construction of state law agreed upon by the two lower federal courts," *Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 395 (1988)). Third, once this Court has announced the principles of federal law that frame construction of an arbitration provision, "it is usually not [the Court's] function in the first instance to construe ... arbitration clauses." *AT&T Techs., Inc. v. Comm'c'ns Workers of Am.*, 475 U.S. 643, 651 (1986). For each of these reasons, Lamps Plus's request that this Court engage in de novo review of the correctness under state law of the lower courts' interpretation of the agreement in this case is unwarranted.

B. The lower courts correctly applied neutral California contract law.

This Court has held that, in an extreme case, a purported application of even neutral state-law contract principles to an arbitration agreement may be so lacking in justification that it does not truly reflect generally applicable contract law because state law in fact "would not interpret contracts other than arbitration contracts the same way." *Imburgia*, 136 S. Ct. at 469. Nothing in the decisions of the lower courts here, however, suggests such an aberration. Rather, their findings of ambiguity and their resolution of the ambiguity against the drafter reflect correct applications of state-law principles.

1. The lower courts correctly found the agreement ambiguous because of affirmative indications in it that could lead a reasonable layperson—whose

understanding is dispositive under California law, *see AIU*, 799 P.2d at 1299—to believe that it would authorize class proceedings in arbitration if an arbitrator determined that certification of a class was appropriate. The arbitration clause's broad references to the claims, proceedings, and remedies available in arbitration, together with its incorporation of arbitral rules permitting class proceedings, provide strong support for reading it to authorize class proceedings, and for application of the principle that any ambiguity on the subject should be resolved against the drafter.

The arbitration agreement, as the lower courts noted, broadly waives an employee's right "to file a lawsuit or other civil action or proceeding" and provides that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." Pet. App. 24a. As the court of appeals pointed out, this language refers not just to lawsuits but also to attendant "proceedings"—a term that, as the court of appeals pointed out, readily encompasses "class proceedings." *Id.* at 3a. Moreover, as Lamps Plus itself points out, one common meaning of "in lieu of" is "in place of." Pet. Br. 15. Lamps Plus does not explain how a purely individual arbitration could reasonably be said to take the "place" of class proceedings. Thus, as the court of appeals stated, "[t]hat arbitration will be 'in lieu of' a set of actions that includes class actions can be reasonably read to allow for class arbitration." Pet. App. 3a.

Lamps Plus objects that this reading would, if accepted, allow an employee to demand that any other procedure applicable in court, such as "the Federal Rules of Civil Procedure" or "a discovery process rivaling that in litigation" be "duplicate[d]" in arbitration.

Pet. Br.15. Lamps Plus's argument confuses "proceedings"—the word used in the agreement—with "procedures." And it wrongly assumes a hypothetical agreement in which the "in lieu of any and all lawsuits and other civil legal proceedings" phrase exists in isolation. Here, the agreement contains provisions addressing procedures and discovery that would render the reading Lamps Plus hypothesizes unreasonable. *See* Pet. App. 25a-26a (incorporating American Arbitration Association (AAA) or JAMS employment dispute arbitration rules), 29a–35a (setting forth additional rules). By contrast, those provisions in no way undercut the reasonableness of a lay reader's understanding that class proceedings, like purely bilateral lawsuits, would have an analog in the arbitration process.

That understanding is supported by other features of the agreement, including its provisions that "all disputes, claims or controversies ... relating to the [parties'] employment relationship" shall be resolved in arbitration, *id.* at 24a, and that arbitration will include "all claims ... in connection with [the employee's] employment ... that, in the absence of this Agreement, would have been available to the parties by law," *id.* at 25a. Again, as the court of appeals pointed out, the matters that the agreement sends to arbitration include disputes and controversies that have classwide dimensions, and the claims that would be available to the employee by law in the absence of the agreement "obviously include claims as part of a class proceeding." *Id.* at 4a.

Lamps Plus contends that this language merely emphasizes that arbitration "encompasses a broad range of substantive disputes," Pet. Br. 15, but that response fails to come to grips with the language quoted above

that extends the agreement's coverage to disputes, controversies, and claims that encompass those that could be asserted on behalf of a class. Moreover, as the court of appeals pointed out, even the part of the agreement that lists specific substantive claims subject to arbitration would tend to reinforce the understanding that the agreement encompasses class disputes because the types of claims listed are ones (such as race and sex discrimination) that are often pursued on behalf of a class. *See* Pet. App. 4a.

Additionally, the agreement provides that an arbitrator may "award any remedy allowed by applicable law." *Id.* at 26a. As the court of appeals observed, to the extent that applicable law would permit a court to award a classwide remedy in an action brought by Mr. Varela, the agreement authorizes an arbitrator to award the same relief. *Id.* at 4a.[8] Lamps Plus objects that "[a] class action is not itself a claim or a remedy, but instead a procedural device for aggregating individual claims." Pet. Br. 16. That observation is true as far as it goes, but it does not answer the point that classwide remedies can only be awarded if the procedural device of a class action is available, *see Zepeda v. INS*, 753 F.2d 719, 730 n.1 (9th Cir. 1983), and that claims can be aggregated only through that procedural device. Thus, if Mr. Varela could use the class-action device in court to assert claims on behalf of a class and obtain

---

[8] *Cf. Mastrobuono*, 514 U.S. at 61 n.7 ("[I]t would seem sensible to interpret the 'all disputes' and 'any remedy or relief' phrases to indicate, at a minimum, an intention to resolve through arbitration any dispute that would otherwise be settled in a court, and to allow the chosen dispute resolvers to award the same varieties and forms of damages or relief as a court would be empowered to award." (quoting *Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 10 (1st Cir. 1989))).

classwide remedies, the same device must be potentially available in arbitration to fulfill the agreement's terms allowing the arbitrator to entertain all claims that would be available by law and award all remedies that would be allowed by law.

2. The reasonable interpretation that these provisions contemplate class arbitration is underscored by the agreement's express incorporation of the employment arbitration rules of both JAMS and AAA. Both organizations have rules providing expressly for class arbitration if arbitrators determine that class treatment is appropriate under the parties' agreement and the circumstances of a case.[9] Lamps Plus asserts that the arbitration providers' class arbitration rules are irrelevant because the agreement "states only that the AAA or JAMS employment arbitration rules shall apply" and "does not refer to" the class action rules. Pet. Br. 16 n.4. But both sets of class arbitration rules specifically state that they apply in arbitrations "pursuant to any of the [provider's] rules" and "shall supplement any other applicable ... rules" of the provider. AAA Class Arbitration Rule 1(a); *see* JAMS Class Arbitration Rule 1(b). The class arbitration rules thus *expressly* apply in cases governed by the employment dispute rules specified in the parties' agreement. That the rules selected by the arbitration agreement contemplate that the arbitrator will consider whether to allow a class proceeding reinforces that the agreement is reasonably read to allow a court to refer class claims to arbitration. That inference is further underscored by

---

[9] *See* AAA Supplementary Rules for Class Arbitrations, https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf; JAMS Class Action Procedures, https://www.jamsadr.com/rules-class-action-procedures/.

the fact that the agreement modifies the providers' rules in certain respects by providing for specific procedural matters that would otherwise be addressed by the rules, *see* Pet. App. 29a–35a, but contains no language suggesting displacement of applicable class arbitration rules and procedures.[10]

The parties' agreement, moreover, broadly grants the arbitrator "exclusive authority to resolve any dispute relating to the interpretation, applicability, enforcement or formation of this Agreement, including but not limited to any claim that all or any part of this Agreement is void or voidable." *Id.* at 30a. This provision is, in this Court's terminology, a "delegation clause" providing for arbitration even of "threshold issues concerning the arbitration agreement," *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010). Its breadth readily encompasses not only such matters of "arbitrability," but also the authority to address procedural matters such as whether to certify a class. Its presence strongly supports the conclusion that the agreement does not unambiguously require a court to refer a case to arbitration on an individual basis only, but permits class claims to be referred for the arbitrator's consideration of whether to allow arbitration to proceed on a class basis.

---

[10] The AAA and JAMS class arbitration rules provide that an *arbitrator* may not consider the existence of the rules as a basis for inferring an agreement to classwide arbitration. AAA Class Arbitration R. 3; JAMS Class Arbitration R. 2. But that is a very different matter from whether a *court* may consider the parties' incorporation of the rules as part of the basis for inferring that they agreed to allow class claims to be referred to arbitration so that the arbitrator could make the required determinations whether class treatment is permissible.

The delegation clause, indeed, would most likely have the broader effect of making the question whether the arbitration agreement permits class arbitration a question for the arbitrator, rather than the judge, even if that question were viewed as a question of arbitrability otherwise reserved for a court. *See Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 399 (2d Cir. 2018) (holding that an agreement empowering an arbitrator to determine questions of "arbitrability" delegates to the arbitrator the issue whether an agreement permits class arbitration); *see also Dish Network LLC v. Ray*, __ F.3d __, 2018 WL 3978537 (10th Cir. Aug. 21, 2018); *Spirit Airlines, Inc. v. Maizes*, __ F.3d __, 2018 WL 3866335 (11th Cir. Aug. 15, 2018).

In this case, the issue whether the class arbitration determination is properly for the court or the arbitrator—a question reserved by the Court in both *Stolt-Nielsen*, 559 U.S. at 680, and *Oxford Health*, 569 U.S. at 569 n.2—was not raised or decided below. Nor, as a consequence, was the impact of the delegation clause on that "who decides" question considered. Even so, the delegation clause remains a strong indication that Lamps Plus is wrong in asserting that the parties did not intend to allow the arbitrator even to consider whether to certify a class. And it renders completely irrelevant Lamps Plus's suggestion that the availability of class arbitration is an issue of "arbitrability" that is "presumptively for a court," Pet. Br. 27 n.6, because the existence of a delegation clause overcomes that presumption. *Rent-A-Center*, 561 U.S. at 69 n.1.

3. Against all these indications that a reasonable lay reader could understand the arbitration agreement to permit class arbitration, Lamps Plus principally

relies on the agreement's use of the terms "I" and "the Company" in, for example, a phrase referring to arbitration of "claims or controversies ... that I may have against the Company ... or that the Company may have against me." Pet. App. 24a. Lamps Plus regards the "use of singular personal pronouns," Pet. Br. 17, as establishing unequivocally that the agreement provides only for bilateral arbitration.

In the context of this agreement, the language Lamps Plus cites is not sufficient to dispel any ambiguity over the authorization for class arbitration or to overcome the conclusion that the most reasonable reading of the agreement is that it permits class arbitration. That the arbitration agreement requires arbitration of Mr. Varela's claims against Lamps Plus does not exclude the possibility that the arbitration may encompass claims that he could assert on an aggregate basis together with those that are exclusively and individually his. No one would suggest, for example, that between 1941 and 1945, the United States was not engaged in a conflict against the Japanese Empire, even though that conflict between two singular nations was part of a larger conflict with several parties on each side. By the same token, when a plaintiff files a civil action against his employer in court, it is undoubtedly a lawsuit "he" brought against "the company," even though he is entitled to maintain his lawsuit as a class action if it meets the criteria of Federal Rule of Civil Procedure 23. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). Likewise, a class arbitration here would be an arbitration of Mr. Varela's claims against Lamps Plus.

Moreover, the language Lamps Plus cherry-picks must be read together with other language in the

agreement calling more broadly for arbitration of "all disputes, claims or controversies" that "relat[e] to ... the employment relationship between the parties," Pet. App. 24a, with no limitation to claims of the singular employee signing the agreement. Similarly, the key language providing for arbitration "in lieu of any and all lawsuits or other civil legal proceedings relating to my employment" lacks the purportedly limiting language on which Lamps Plus relies. A class proceeding involving the data breach at issue would without question involve "disputes, claims or controversies" as well as "civil legal proceedings" that would "relat[e]" to Mr. Varela's employment (as well as to that of other members of the class). It would also involve claims that would be "available to the parties by law," *id.* at 25a, and lead to "remed[ies] allowed by applicable law," *id.* at 26a. Lamps Plus's contention that the agreement's language is inherently limited to bilateral proceedings does not account for these provisions.

4. Lamps Plus's argument that the procedural provisions of the agreement bolster its exclusively-bilateral interpretation is equally unconvincing. That argument rests principally on a provision establishing a default rule of one fact deposition per side, which Lamps Plus views as inconsistent with class proceedings. Leaving aside that the provision is also inconsistent with even purely bilateral pursuit of most of the kinds of claims listed in the arbitration agreement ("claims for discrimination or harassment based on race, sex, sexual orientation, religion, national origin, age, marital status, or medical condition or disability," *id.* at 25a), Lamps Plus ignores that the agreement expressly permits an arbitrator to grant leave for more discovery on a showing of substantial need, *id.* at 32a. An

arbitrator would undoubtedly recognize such need in a case determined to be appropriate for class proceedings.

Lamps Plus's further argument that the procedural provisions' references to "either party," *id.*, contemplate bilateral arbitration overlooks that as a formal matter, class members are not *named* parties, *see Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002). In a case with a single class representative and a single defendant, it is quite natural to refer to "either party."

Most importantly, Lamps Plus's invocation of the procedures called for in the agreement overlooks the elephant in the room: the agreement's incorporation of the AAA and JAMS rules, which authorize consideration of requests that an arbitration be maintained on a class basis. In determining whether a reasonable lay person could think the agreement provided for class arbitration, the minor provisions it mentions pale in significance beside the one it ignores.

5. Lamps Plus's assertion that California intermediate appellate court authority supports its view that the opinions below do not reflect "neutral application of ordinary state-law contract principles," Pet. Br. 19–20, is also unavailing. Lamps Plus cites two decisions, *Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal. Rptr. 3d 198 (Cal. Ct. App. 2012), and *Kinecta Alternative Financial Solutions, Inc. v. Superior Court*, 140 Cal. Rptr. 3d 347 (Cal. Ct. App. 2012), *disapproved of on other grounds*, *Sandquist*, 376 P.3d at 523 n.9.[11]

---

[11] Both *Nelsen* and *Kinecta* were decided before the California Supreme Court ruled in *Sandquist* that, under California procedural law, California state courts should leave the determination whether an arbitration agreement authorizes class arbitration to

(*Footnote continued*)

Neither decision calls into doubt the lower courts' application of California law principles in this case.

In both cases, the courts found that the *only* relevant language in the arbitration provisions at issue limited those agreements to individual claims between the employee and employer. *See Nelsen*, 144 Cal. Rptr. 3d at 211 ("All of the relevant contractual language ... contemplates a two-party arbitration. No language evinces an intent to allow class arbitration."); *Kinecta*, 140 Cal. Rptr. 3d at 356. Neither decision addresses language similar to the provisions that the lower courts relied on in this case as indicia of intent to permit class proceedings; conversely, nothing in the lower courts' opinion here suggests that they would have found an intent to permit class arbitration based only on the language addressed by *Nelsen* and *Kinecta*. The decisions thus do not suggest that the lower courts in this case deviated from neutral application of California contract law.

To the extent the cases Lamps Plus cites have any bearing on this case, they underscore that "[t]he question of whether there is a contractual basis for concluding the parties intended to allow class arbitration must ... be based on state law principles of contract interpretation to the extent they are consistent with the parameters of the FAA as described in *Stolt-Nielsen*." *Nelsen*, 144 Cal. Rptr. 3d at 209. The decisions apply the same principles of California contract law relied on by the lower courts in this case, *see id.* at 209–10, except that, because of the absence of ambiguity in the contracts before them, they do not consider the

---

the arbitrator. *Sandquist* disapproved *Kinecta* "to the extent it suggests the availability of class arbitration is always an issue for the court." 376 P.3d at 523 n.9.

principle of construing ambiguities against the drafter. The California Supreme Court's subsequent opinion in *Sandquist* leaves no doubt that that principle is also among the generally applicable California rules of contract construction that apply to arbitration agreements, as well as other contracts. 376 P.3d at 514.

Lamps Plus's citations thus do not establish that the lower courts failed to adhere to California law, but instead that courts may arrive at different results in applying neutral rules of contract construction to contracts with different language. More than that, they show that California contract-law principles do not "covertly" discriminate against arbitration, *Kindred*, 136 S. Ct. at 1426, by stacking the deck in favor of findings that parties agreed to class arbitration. Application of those principles has elsewhere resulted in findings that parties did not agree to class arbitration where an agreement provided no support for class arbitration, and will undoubtedly continue to do so in those circumstances.

V. Both Lamps Plus's policy arguments and its waived request that the Court require a heightened standard of clarity for agreements to class arbitration are unavailing.

A. Lamps Plus did not preserve an argument for a "clear and unmistakable" standard.

Evidently not trusting that ordinary principles of contract construction will support the result it seeks, Lamps Plus includes in its brief a belated plea for adoption of a rule that class arbitration is permissible only if a contract "clearly and unmistakably" authorizes it. The issue is not properly before this Court because

Lamps Plus did not argue for such a rule below and the lower courts did not consider the question. *See TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) ("We do not reach this issue because it was not raised or briefed below."). Moreover, the argument was not advanced in the petition for certiorari, which focused exclusively on whether the court of appeals' decision is compatible with *Stolt-Nielsen*'s requirement that class arbitration have a contractual basis. And it is not fairly included in the question presented, which is premised on the supposed absence of any support in the agreement for class arbitration, not on the absence of clear and unmistakable authorization. *See* Pet. i. The new issue that Lamps Plus now addresses "may be '*related* to the one petitione[r] presented, and perhaps *complementary* to the one petitione[r] presented,' but [it is] not 'fairly included therein.'" *Wood v. Allen*, 558 U.S. 290, 304 (2010) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992)).

B. Lamps Plus's policy arguments for a stricter standard are unconvincing.

Lamps Plus has in any event failed to justify adoption of the standard it seeks. Although Lamps Plus invokes a number of policies that it claims support a more stringent approach to determining whether parties have agreed to class arbitration, *see* Pet. Br. 23–27, it overlooks that the very basis of *Stolt-Nielsen* was that the question whether an agreement allows arbitrators to consider certifying a class should not be decided on policy grounds, but instead depends on the "contractual rights and expectations" of the parties. *See* 559 U.S. at 682. Indeed, if Lamps Plus were correct, then the Court should have held in *Oxford Health* that the arbitrator had exceeded his authority under

the FAA by applying tools of contractual construction to resolve ambiguity rather than applying a per se requirement that an agreement forecloses class arbitration if it does not clearly and unmistakably authorize it. In the face of this Court's precedents, Lamps Plus identifies no reason to believe that ordinary tools of contract construction are not best suited to the task of determining the parties' intentions regarding class arbitration, "as with any other contract." *Stolt-Nielsen*, 559 U.S. at 682.

Lamps Plus contends that applying standard contract law makes it "'trivially easy' for courts 'to undermine the [FAA],'" Pet. Br. 23 (quoting *Kindred*, 137 S. Ct. at 1428), by interpreting "garden-variety arbitration agreements ... to permit class arbitration," *id.* That contention ignores that the lower courts' construction of the agreement in this case rests not on "garden-variety" features, but on specific language, which Lamps Plus largely ignores, differentiating it from other arbitration agreements. And Lamps Plus points to no evidence that application of standard contract-interpretation principles by courts has led to widespread evasion of the FAA; indeed, it points to no other case in which a court has construed a contract to allow class arbitration.

Lamps Plus also asserts that applying normal contract-law principles to determine whether an agreement authorizes class arbitration creates due process concerns. But those concerns do not arise from the determination that an agreement permits an arbitrator to consider class arbitration; they relate instead to the questions whether an arbitrator should certify a class, what procedural protections apply to class arbitration, and what effect a class arbitration award or settlement

has. However serious those questions may be, this case involves only the antecedent question whether the parties have agreed to allow an arbitrator to address them. Under the FAA, that question is one of contractual intent, as *Stolt-Nielsen* held.

Moreover, Lamps Plus's "due process" objections are unsupported by any real-world examples of unfairness, even though class arbitration has existed at least since this Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), and courts and arbitrators have been operating within the *Stolt-Nielsen* framework for nearly a decade. Abandoning the contractual approach to the question should have a firmer justification. Lamps Plus's argument also proves too much: It suggests that *no* degree of clarity in an agreement between two parties should allow class arbitration—a position not even Lamps Plus advocates.

Lamps Plus's suggestion that the Court should rest its decision on the view that class proceedings do not benefit employees is equally unwarranted. Such considerations might be pertinent if the decision below rested on a "policy preference for class actions," as Lamps Plus speculates. Pet. Br. 25. The lower courts' decisions, however, rested on *Stolt-Nielsen*'s contractual approach, which already incorporates this Court's conclusion that the meaning of the agreement, not policy preferences, governs.

The "evidence" that Lamps Plus adduces is in any event irrelevant to the class arbitration. Lamps Plus claims that "studies have shown that employees who arbitrate their claims are more likely to prevail than those who go to court." Pet. Br. 26. That point has nothing to do with this case, which is not about whether Mr. Varela will arbitrate his claims or go to

court, but about what form arbitration will take. Lamps Plus cites no comparisons of outcomes of class and individual arbitrations. And even taken on their own terms, Lamps Plus's citations are unpersuasive: Analyses of broader datasets than those available at the time of the dated studies Lamps Plus cites have shown that employees who arbitrate are less likely to win, likely to receive smaller awards, and face a disadvantage because of the repeat-player effect that benefits employers who appear frequently before the same arbitration tribunals.[12]

Wherever the truth lies, uncritical acceptance of arguments that individual arbitration is better for employees should not figure into any decision in this case. Lamps Plus's dubious empirical assertions have nothing to do with what this Court has held to be the dispositive question: The meaning of the parties' contract.

C. Lamps Plus's new theory that class arbitration is an issue of "arbitrability" does not support its position.

Finally, Lamps Plus asserts that the Court should adopt its newly proposed "clear and unmistakable" standard because the potential availability of class arbitration is a "gateway" issue of "arbitrability" similar to those that this Court has held are "for judicial decision" unless the parties "clearly and unmistakably provide otherwise." Pet. Br. 28 (quoting *Howsam v. Dean*

---

[12] *See* Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 Indus. & Lab. Rel. Rev. 1019 (2015); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lab. L. 71 (2014); Alexander J.S. Colvin, *An Empirical Study of Arbitration: Case Outcomes and Processes*, 8 J. Empir. Legal Stud. 1 (2011).

Witter Reynolds, Inc., 537 U.S. 79, 83 (2002)). Even if the Court were to overlook Lamps Plus's waiver of this argument, it is difficult to see how invoking *Howsam* supports its position. First, Lamps Plus *received* a judicial determination on the issue. Therefore, even if its position that class arbitration is a matter of arbitrability were correct, it has already had the benefit of the principle it invokes. Second, if the Court were to entertain Lamps Plus's new argument that whether an agreement permits class arbitration is a matter of arbitrability requiring a clear and unmistakable contractual basis, it would logically also have to consider that the delegation clause in the parties' agreement provides that issues of arbitrability are for the *arbitrator*. Lamps Plus cannot have its cake and eat it, too: If the Court entertains an issue Lamps Plus waived, it must also take up matters "predicate to an intelligent resolution" of that issue. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996). Doing so would require the conclusion that Lamps Plus agreed to let the arbitrator decide whether class arbitration is permitted, foreclosing its plea for an order compelling arbitration only of individual claims.

In any event, Lamps Plus is wrong to assert that the considerations that call for a "clear and unmistakable" standard for the question of who decides matters of arbitrability are applicable to decisions about whether an agreement is properly interpreted to allow class arbitration. The decision whether to compel arbitration is made against a statutory backdrop that permits a court to compel arbitration only on finding that the parties entered into a valid agreement to arbitrate a particular subject. *See* 9 U.S.C. §§ 2, 4; *Mitsubishi*, 473 U.S. 625–26; *First Options*, 514 U.S. at 945; *Rent-A-Center*, 561 U.S. at 71. In light of that statutory

structure, an agreement to allow arbitrators to decide questions of arbitrability runs so counter to the presumed expectations of *all* parties to an agreement that the Court adopted the unusual clear-and-unmistakable standard to protect the reasonable expectations of the parties. *See First Options*, 514 U.S. at 945.

At the same time, the Court stressed that the norm is that interpretation of arbitration agreements remains governed by "ordinary state-law principles." *Id.* at 944. *Stolt-Nielsen* likewise concluded that "contractual rights and expectations" should govern the class arbitration question. 559 U.S. at 682. Particularly in a setting where the reasonable expectations of the parties may differ, replacement of a contract-law based standard with one that places a heavy thumb on the scales in favor of the party that has typically dictated the terms of the agreement is unwarranted. There is no reason to believe that ordinary contract-law principles are not up to the task of resolving disputes about the meaning of agreements about class arbitration—especially when the drafter always has the ability to make the parties' mutual intentions clear by incorporating an explicit prohibition on class proceedings. *See Dish Network*, 2018 WL 3978537 at *15 (Tymkovich, C.J., concurring) (citing *Epic Sys.*, 138 S. Ct. at 1632; *Concepcion*, 563 U.S. at 352).

CONCLUSION

This Court should either vacate the court of appeals' opinion and dismiss Lamps Plus's appeal or affirm the judgment of the court of appeals.

Respectfully submitted,

MICHELE M. VERCOSKI
Counsel of Record
RICHARD D. MCCUNE
MCCUNE WRIGHT
AREVALO, LLP
3281 East Guasti Road
Suite 100
Ontario, CA 91761
(909) 557-1250
mmv@mccunewright.com

SCOTT L. NELSON
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Respondent

August 2018

APPENDIX

STATUTES INVOLVED

1. Section 16 of the Federal Arbitration Act, 9 U.S.C. § 16, provides:

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

2. 28 U.S.C. § 1254 provides in pertinent part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree ....

3. 28 U.S.C. § 1291 provides in pertinent part:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States ....

4. Cal. Civ. Code § 1635 provides:

All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code."

5. Cal. Civ. Code § 1636 provides:

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

6. Cal. Civ. Code § 1638 provides:

The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

7. Cal. Civ. Code § 1644 provides:

The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless

a special meaning is given to them by usage, in which case the latter must be followed.

8. Cal. Civ. Code § 1649 provides:

If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.

9. Cal. Civ. Code § 1654 provides:

In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who cause the uncertainty to exist.